The Gradation of Fourth Amendment Doctrine in the Context of Street Detentions: *People v. DeBour*

> Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.[1]

With this admonition to the judiciary to guard against unjustified police conduct, the United States Supreme Court in *Terry v. Ohio*[2] sustained the police practice of forcible street detentions against a challenge that this practice constituted a seizure in violation of the fourth amendment. The Court failed, however, to adequately explain what constitutes a "seizure" within the fourth amendment[3] and to delineate the criteria the police must satisfy in order to justify street detentions.[4] This failure by the Court not only left these important tasks to the lower federal and state courts but also seriously undermined the ability of these courts to perform the protective function assigned to them in *Terry*. As a result, the variations existing prior to *Terry* in the lower courts regarding the resolution of the street detention issues continued.

The case of *People v. DeBour*[5] is an example of the continuing efforts of the New York Court of Appeals to fill the definitional void left by *Terry*. Prior to *DeBour* the court of appeals had developed a three-tiered hierarchy of permissible police intrusions into individual privacy, along with correlative standards for justifying each tier.[6] In *DeBour*, the court added to these existing tiers by recognizing a new level of permissible police intrusion and by creating a new justification for this level. In so doing, however, the court appears to have abdicated the protective responsibiity assigned to it in *Terry*. This graduated analysis of seizure situations, which was further extended in *DeBour*, substantially lessens the quality of suspicion necessary to justify an intrusion into individual privacy and thereby increases the

1. Terry v. Ohio, 392 U.S. 1, 15 (1968).

2. 392 U.S. 1 (1968).

3. *See* United States v. Ward, 488 F.2d 162, 169 (9th Cir. 1973).

4. "In Terry v. Ohio . . . the Court declined expressly to decide whether facts not amounting to probable cause could justify an investigative seizure short of an arrest . . . ." United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975).

5. 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976).

6. *See* People v. La Pene, 40 N.Y.2d 221, 222-23, 386 N.Y.S.2d 384, 384-85, 352 N.E.2d 571, 571-72 (1976).

risk of police conduct that is "overbearing or harassing, or which trenches upon personal security." The purpose of this Case Comment is to analyze this important fourth amendment decision, to examine its doctrinal ramifications, and to focus on the dangers to privacy and security rights resulting from the type of gradation of fourth amendment theory undertaken by the New York Court of Appeals.

I. PEOPLE V. DEBOUR

Shortly after 12 a.m. on the morning of October 15, 1972, two patrol officers of the New York Police Department observed Louis De Bour approaching them on a well-illuminated sidewalk in an area of Brooklyn later described by the officers at the suppression hearing as having a high incidence of narcotics activity. When DeBour, who was alone on the street, came within thirty to forty feet of the uniformed officers he crossed the street. Although the two officers had no information regarding any unsolved crimes in the area nor a suspect description that resembled DeBour, they concluded that he was avoiding them in order to disguise some criminal activity and they crossed the street to confront him. They first asked his business in the neighborhood. DeBour clearly but nervously responded that he was going to a friend's house. The officers then asked to see DeBour's identification, which he was not carrying. At this point one of the officers noticed a slight bulge in DeBour's jacket at waist level and asked him to unzip his coat and reveal what was beneath it. DeBour's compliance with this "request" revealed a gun protruding from his waistband. The officers immediately seized the weapon and arrested DeBour for possessing it.[7]

At the subsequent suppression hearing the officers attempted to justify their intrusive action by characterizing it as a momentary encounter and by positing their belief that DeBour had crossed the street to avoid apprehension for narcotics activities. The trial court admitted the gun into evidence, and DeBour pleaded guilty to the charge of felonious attempted possession of a weapon. The appellate division unanimously affirmed the suppression hearing ruling.[8]

Upon appeal to the New York Court of Appeals, DeBour argued that the gun was the inadmissible fruit of an unconstitutional seizure. He argued that the officers had "seized" him within the meaning of the fourth amendment by depriving him of his freedom of movement, and that his conduct was not sufficiently unusual to justify this seizure. The gist of his argument was that the "seizure" of his person was un-

7. People v. DeBour, 40 N.Y.2d 210, 213-14, 386 N.Y.S.2d 375, 378, 352 N.E.2d 562, 565 (1976).

8. *Id.* at 214, 386 N.Y.S.2d at 378-79, 352 N.E.2d at 565.

constitutional because his conduct did not support a "founded suspicion" of criminal activity.[9]

In affirming the decision to admit the gun into evidence, the court of appeals conceded that the officers did not have sufficient information to *reasonably suspect* DeBour of being involved in criminal activity based on the facts known to them at the moment of detaining him. It held, however, that the questioning by the officers did not constitute a "stop" involving actual or constructive restraint of DeBour and therefore did not require the justification of reasonable suspicion.[10] Instead, the court ruled that a sufficient basis for the minimal police intrusion of approaching an individual to request information need only be "some articulable reason sufficient to justify the police action that was undertaken."[11] The court further stated that this basis need not be supported by any indication of criminal activity on the part of the person questioned and set out three criteria for determining whether the questioning of a pedestrian by an officer acting within the scope of his criminal law enforcement duties was unreasonably prompted by whimsical motivations.[12] Applying the "articulable reason" standard and the three motivational criteria to the circumstances of the questioning of DeBour, the court concluded that the conduct of the officers was reasonable.[13]

II. THE HISTORICAL AND CONSTITUTIONAL BACKGROUND OF STREET QUESTIONINGS

A. *The Fourth Amendment—The Individual's Consideration*

The fourth amendment to the United States Constitution states in part that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated."[14] Implicit in this declaration is the historic resolve to protect from unreasonable government intrusions the cherished values of individual privacy and personal security[15] universally acknowledged as fundamental to a free society.[16] This right to privacy was described by Mr. Justice Douglas as follows:

9. *Id.* at 215, 386 N.Y.S.2d at 379, 352 N.E.2d at 566.

10. *Id.* at 217, 386 N.Y.S.2d at 380, 352 N.E.2d at 567.

11. *Id.* at 213, 386 N.Y.S.2d at 378, 352 N.E.2d at 565.

12. *Id.* at 219, 386 N.Y.S.2d at 382, 352 N.E.2d at 569.

13. *Id.* at 220, 386 N.Y.S.2d at 383, 352 N.E.2d at 570.

14. The fourth amendment reads in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

15. *See* Schmerber v. California, 384 U.S. 757, 767 (1966); Jones v. United States, 357 U.S. 493, 498 (1958); Wolf v. Colorado 338 U.S. 25, 27 (1949).

16. These rights have been characterized as: "basic to a free society," Wolf v. Colorado,

> Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. . . . Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing.[17]

Mr. Justice Jackson emphasized the importance of vigilantly preserving these rights:

> These [fourth amendment rights] . . . are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[18]

In order to effectively safeguard these rights, the Supreme Court early adopted several protective measures. One measure was the imposition of standards of suspicion necessary to justify intrusive governmental conduct, undertaken with or without a warrant.[19] The measure of probable cause was defined as the conclusions of guilt a "reasonable man" would draw under the same circumstances.[20] The intention underlying the establishment of such a stringent standard was to protect the individual's privacy from the subjective—sometimes speculative—suspicions of government officers.

Another protective measure, which was closely related to the probable cause limitation, was the judicial practice of liberally construing all fourth amendment limitations on intrusive governmental actions.[21] Both measures were intended to assure the protection of individual rights, and both continue to evince the importance of the values that they were intended to defend.

These values are necessarily evoked each time an individual's solitude is invaded by government officials. A common example of intrusive governmental activity is the street detention of individuals by police officers.[22] A typical street detention involves an approach to and stop of an individual by a police officer in order to elicit information concerning, for example, the individual's identity or his business in

338 U.S. 25, 27 (1949); one of the "indispensable freedoms," Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting); "one of the unique values of our civilization," McDonald v. United States, 335 U.S. 451, 453 (1948); the "essence of constitutional liberty," Harris v. United States, 331 U.S. 145, 150 (1947). *See* Gouled v. United States, 255 U.S. 298, 304 (1921).

17. Warden v. Hayden, 387 U.S. 294, 323 (1967) (Douglas, J., dissenting).

18. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

19. *See, e.g.*, Draper v. United States, 358 U.S. 307, 311-12 (1959); Carroll v. United States, 267 U.S. 132, 149 (1925).

20. Draper v. United States, 358 U.S. 307, 313 (1959).

21. *See* United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Gouled v. United States, 255 U.S. 298, 304 (1921).

22. *See* Terry v. Ohio, 392 U.S. 1, 20 (1968).

the area. The officer then decides, on the basis of the responses given, whether to release the suspect, to detain him for further questioning, or to arrest and search him.[23] The substantial potential for undetected unreasonable invasions of an individual's rights of privacy and personal security—along with the possibilities of other arbitrary police conduct—suggest the many dangers to individual rights and societal values lurking within this largely unregulated police practice.[24] The fact that the degree of coercion involved in these intrusions may generally be less than that of arrests or searches does not lessen the deteriorative impact such detentive intrusions have upon fourth amendment rights. The importance of preserving privacy and security values demands a close and critical examination of the police practice of street detentions and judicial attempts to regulate the practice.

B. *The Government's Viewpoint*

Balanced against these privacy and security rights are the common law justification and the societal interests asserted in support of street detention practices. Support for the police practice of approaching suspicious persons to question them has been found in the common law right of inquiry.[25] The case of *Lawrence v. Hedger*[26] has been cited as an example of early common law approval of the police right to question. Close examination of this case suggests, however, that the policeman's "right" to exercise this prerogative was not unlimited but was contingent upon satisfying a reasonableness requirement.[27] Presumably, the requirement of reasonableness was intended to protect the individual from arbitrary official intrusion.

Consistent with the common law right was the commonly expressed view that intrusive police actions were oftentimes necessary

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23. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

24. "This inestimable right of personal security belongs as much to the citizens on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Id.* at 8-9.

25. *E.g.*, United States v. Vita, 294 F.2d 524, 530 (2d Cir. 1961); People v. Rivera, 14 N.Y.2d 441, 445-46, 252 N.Y.S.2d 458, 462, 201 N.E.2d 32, 35 (1964), *cert. denied*, 379 U.S. 978 (1965). This common law right to inquire has been described as follows:

> Watchmen and beadles have authority at common law to arrest and detain in prison for examination, persons walking in the streets at night, whom there is a *reasonable ground* to suspect of a felony, although there is no proof of a felony having been committed.
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> . . . .
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> . . . [B]ut in the night, when the town is to be asleep, and it is the especial duty of these watchmen, and other officers, to guard against malefactors, it is highly necessary that they should have such a power of detention. And in this case, *what do you talk of groundless suspicion? There was abundant ground of suspicion here.*

Lawrence v. Hedger, 3 Taunt. 13, 13, 16, 128 Eng. Rep. 6, 6-7 (1810) (emphasis added).

26. 3 Taunt. 13, 128 Eng. Rep. 6 (1810). *See also* 2 HAWKINS, PLEAS OF THE CROWN 122 (1824).

27. Consider, as one example, the italicized language of the quotes taken from *Lawrence v. Hedger* in note 25 *supra*.

for effective crime detection and prevention.[28] During the 1950's and 1960's state legislatures began to formally enact this viewpoint into law. Many states enacted "stop-and-frisk" statutes that authorized the police to forcibly detain and question individuals whom the police reasonably suspected of being involved in criminal activity.[29] These grants of police power did not go unchallenged, however, as writers and jurists attacked them as both unconstitutional and destructive of individual rights.[30] Furthermore, the possible dangers created by these statutes were exacerbated by the fact that they neither specifically defined the police actions that they authorized nor did they classify the types or degrees of intrusions falling within the ambiguous term "stop."[31]

In other states similar powers were given the police by court decisions. These decisions also attempted to limit the exercise of this power by imposing "reasonableness" and "appropriateness" conditions.[32] Nevertheless, as with "stop-and-frisk" statutes, most of these decisions failed to define the permissible limits of a street detention and did not attempt to classify degrees and types of intrusions. Rather, they commonly focused immediately on the issue of whether the particular intrusion involved was reasonably justified under the circumstances.[33] Apparently, all police detentions less intrusive than an arrest were regarded as triggering the single reasonableness criterion applied in that particular jurisdiction to nonarrest intrusions.

C. *The Efforts of the Supreme Court*

The United States Supreme Court did not confront the issue of the permissible scope of the police power under the fourth amendment to detain and question individuals in a nonarrest situation until its decision in *Terry v. Ohio*.[34] In *Terry* the Court was faced for the first time with several unsettled questions concerning the constitu-

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28. *See, e.g.*, People v. Rivera, 14 N.Y.2d 441, 444-45, 252 N.Y.S.2d 458, 461, 201 N.E.2d 32, 34 (1964), *cert. denied*, 379 U.S. 978 (1965).

29. *See, e.g.*, DEL. CODE tit. 11, § 1902 (1953); MASS. GEN. LAW ANN. ch. 41, § 98 (Michie/Law Co-op 1966); N.H. REV. STAT. ANN. § 495:2 (1955); N.Y. CRIM. PROC. LAW § 180-a (McKinney 1970); R.I. GEN. LAWS ANN. § 12-7-1 (1956).

30. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 35 (1968) (Douglas, J., dissenting); Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L.C. & P.S. 433 (1967).

31. The test of N.Y. CRIM. PROC. LAW § 180-a (McKinney 1970) exemplifies the general requirements of these sections. It states that "[a] police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony . . . and may demand of him his name, address, and an explanation of his actions."

32. *See, e.g.*, State v. Gunter, 100 Ariz. 356, 360-61, 414 P.2d 734, 737 (1966); Shipley v. State, 243 Md. 262, 267, 220 A.2d 585, 587 (1966); State v. Terry, 5 Ohio App. 2d 122, 126, 214 N.E.2d 114, 118 (1966), *aff'd*, 392 U.S. 1 (1968); Moore v. State, 306 P.2d 358, 360 (Okla. Crim. App. 1957); Commonwealth v. Hicks, 209 Pa. Super. Ct. 1, 5, 223 A.2d 873, 876 (1966) *rev'd on other grounds*, 434 Pa. 153, 253 A.2d 276 (1969).

33. *See* cases cited note 32 *supra*.

34. 392 U.S. 1 (1968).

tional status of street confrontations. Did an officer conduct a fourth amendment "seizure" when he asked a person incriminating questions? If so, then what quality and quantity of suspicion should be required of officers to justify this seizure? Finally, regardless of whether the officer's conduct in *Terry* constituted a seizure, what were the minimum levels of police intrusion that would constitute a seizure in future street confrontation circumstances?

In *Terry* a Cleveland police officer, during a ten minute time span, had observed the defendants take turns walking from a street corner to a store window, peering briefly into the window, walking a short distance beyond the window before returning to the window, peering in again, and then returning to the street corner. Although the officer had received no reports concerning the defendants, his suspicion was aroused by their unusual behavior. He approached the men, identified himself as a police officer, and asked for their names. Terry gave him an unsatisfactory response, prompting the officer to grab him and pat down his outer clothing as a protective measure. The officer uncovered a gun during this pat-down and arrested Terry for possession of the weapon.[35]

The Supreme Court sustained the admission of the gun as evidence, holding:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[36]

Although the focus of this holding is primarily upon the conditions necessary to justify a pat-down search, the language suggests that in order to justify "reasonable inquiries" a police officer must have observed "unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot."[37] Whether the Court intended this inference is arguable because earlier in the opinion the Court had stated that "[w]e . . . decide nothing today concerning the constitutional propriety of an investigative 'seizure'

35. *Id.* at 5-7.

36. *Id.* at 30.

37. *Id.* This language raises a question of inconsistency in the Court's opinion. In stating here that an officer's "reasonable" conclusion may be based upon his prior experience the Court appears to adopt a "reasonable policeman" standard for determining the validity of initiating street detentions. Earlier in the opinion, however, the Court had stated that the traditional "reasonable man" standard applied to all seizures—which would seemingly include street detentions. *See* text accompanying note 41 *infra*.

upon less than probable cause for purposes of 'detention' and/or interrogation."[38] Nevertheless, many lower courts have interpreted *Terry* as embracing a standard of "reasonable suspicion" for all degrees of police detention short of arrest.[39]

The Court in *Terry* did expressly delineate two general requirements for a permissible intrusion. It first required that "the police officer . . . be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[40] It then enunciated the general objective standard by which the reasonableness of any "seizure" should be measured. "[I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[41] It was unclear, however, whether the Court intended that these general standards also be applied to those street detentions that involved a degree of forcible restraint less than that involved in *Terry*.[42]

The Court also addressed two other constitutional questions concerning street confrontations—whether a questioning constituted a "seizure" and what minimum levels of intrusive conduct constituted a seizure. The Court gave two general definitions of a seizure, stating: "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person,"[43] and that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[44] Based upon these definitions, the Court ruled that "[i]n this case there can be no question . . . that Officer McFadden 'seized' petitioner . . . when he took hold of him."[45] The Court refused, however, to determine whether the officer's initial intrusive action of stopping and questioning Terry constituted a seizure.[46] Further, the Court did not define the terms "show of authority" or "physical force"; therefore, the minimum level of restraint sufficient to constitute a seizure remained unclear.

Thus, although the majority did recognize and address the un-

38. *Id.* at 19 n. 16.

39. *See* Note, *Stop and Frisk: The Issue Unresolved*, 49 U. DET. J. URB. L. 733, 758-61 (1972).

40. 392 U.S. at 21.

41. *Id.* at 21-22.

42. *See* note 4 *supra.*

43. 392 U.S. at 16.

44. *Id.* at 19 n. 16.

45. *Id.* at 19.

46. "We cannot tell with any certainty upon this record whether any . . . 'seizure' took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred." 392 U.S. at 19 n. 16.

settled questions concerning street confrontations, it did not give answers that would provide clear guidance to the lower courts responsible for regulating police practices. In subsequent decisions involving street confrontations, the Supreme Court either refused to avail itself of opportunities to clarify the principles of *Terry* or did so in a generally unsatisfactory manner.[47]

One recent Supreme Court decision,[48] however, suggests a doctrinal trend regarding police intrusions that could be applied to street detentions. In *Brignoni-Ponce*, the Court held that stops of moving vehicles by roving border patrol officers required as a minimum justification a reasonable suspicion of criminal activity.[49] The Court stated: "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. . . . '[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person'. . . ."[50] Although the facts of *Brignoni-Ponce* are distinguishable from a questioning of a pedestrian, the essential similarity of the intrusions and of the privacy rights invoked in both circumstances support the application of the reasonable suspicion standard to the questioning of pedestrians.[51]

D. *The Efforts of the New York Court of Appeals*

The New York Court of Appeals began establishing a hierarchy of nonarrest police intrusions, and correlative degrees of suspicion

47. In Sibron v. New York, 392 U.S. 40 (1968), and Wainwright v. City of New Orleans, 392 U.S. 598 (1968), the Supreme Court failed to clarify the principles of *Terry*. The most recent decision by the Supreme Court discussing street detention issues is Adams v. Williams, 407 U.S. 143 (1972). In that case, a police officer, acting on a reliable informant's tip that Williams was in possession of illegal narcotics and was carrying a handgun in his waistband, approached Williams' car and asked him to open his car door. When Williams lowered his window instead, the officer, without patting him, reached immediately through the window to Williams' waistband and seized the gun. The officer thereafter arrested Williams for possession of the weapon and found the reported narcotics through search incident to the arrest. In reversing the Second Circuit's decision that the search was unlawful the Court held that the officer, after making a lawful investigatory stop, had sufficient reason to believe Williams was armed and dangerous to justify the protective search for the gun. The decision appears to determine that a fourth amendment seizure occurred when Williams rolled down his window in response to the officer's request to open his door. 407 U.S. at 146 n.1.

The Court also decided that the officer had "reasonable cause" to approach the defendant. *Id.* at 147. More generally, the Court decided that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information may be most reasonable in light of the facts known to the officer at the time." *Id.* at 146. These determinations suggest that an objective standard of justification was being applied to the seizure that had transpired. Nevertheless, this decision only serves as an example of a factual circumstance constituting a seizure because the Court did not add clarity to the general language of *Terry*.

48. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

49. *Id.* at 881-82.

50. *Id.* at 878.

51. Consider, for example, the reasoning of the Ninth Circuit Court of Appeals in United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973):

Although a pedestrian and an automobile are not in identical circumstances, we see no

necessary to justify them, several years before *Terry* was decided,[52] and it continued this process in *People v. DeBour*.[53] This hierarchal structure was summarized by the court of appeals in *People v. LaPene*,[54] the companion case to *DeBour*, as follows:

> We bear in mind that any inquiry into the propriety of police conduct must weigh the interference it entails against the precipitating and attending conditions. By this approach various intensities of police action are justifiable as the precipitating and attendant factors increase in weight and competence. [1] The minimal intrusion of *approaching to request* information is permissible when there is some *objective credible reason* for that interference not necessarily indicative of criminality (*People v. DeBour* . . .). [2] The next degree, *the common-law right to inquire*, is activated by a *founded suspicion that criminal* activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to *interfere with a citizen to the extent necessary to gain explanatory information*, but short of a forcible seizure. . . . [3] Where a police officer entertains a *reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor*, the CPL [a state statute] authorizes a *forcible stop and detention* of that person. . . . [4] Finally a police officer *may arrest and take into custody* a person when he has *probable cause* to believe that person has committed a crime, or offense in his presence. . . . This synopsis represents the *gradation* of permissible police authority with respect to encounters with citizens in public places and directly correlates the degree of objectively credible belief with the permissible scope of interference.[55]

Thus, it was against the background of the dearth of Supreme Court guidance and the pre-existing doctrinal levels of intrusion summarized in *LaPene* that the court of appeals reviewed the intrusion that occurred in *DeBour*.

III. ANALYSIS OF *People v. DeBour*

A. *The Treatment of Pre-existing Fourth Amendment Standards by the Court of Appeals*

DeBour argued that his gun was not admissible as evidence on the ground that the gun was the "fruit" of a seizure that had violated his fourth amendment right. He asserted that the seizure occurred when the officers confronted him and "caused him to stand still" because "he was deprived of his freedom of movement by [this] obvious show of authority and the equally obvious display of force . . . ."[56]

reason why similar Fourth Amendment standards should not be applied in both situations. A person whose vehicle is stopped by police and whose freedom to drive away is restrained is as effectively "seized" as is the pedestrian who is detained.

52. *See* People v. Rivera, 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32 (1964), *cert. denied*, 379 U.S. 978 (1965).

53. 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976).

54. 40 N.Y.2d 221, 386 N.Y.S.2d 384, 352 N.E.2d 571 (1976).

55. *Id.* at 223, 386 N.Y.S.2d at 384-85, 352 N.E.2d at 571-72 (citations omitted) (emphasis added).

56. People v. DeBour, 40 N.Y.2d 210, 215, 386 N.Y.2d 375, 379, 352 N.E.2d 562, 566 (1976).

This confrontation-seizure, he contended, was unconstitutional because his crossing of the street in front of the officers could not reasonably give rise to "a founded suspicion predicated on . . . articulable facts that criminal activity [was] afoot."[57]

The court of appeals characterized DeBour's contentions as seeking "a blanket prohibition of all police-citizen encounters conducted in the absence of probable cause or reasonable suspicion based on concrete observations."[58] The court also apparently attributed to DeBour the corollary argument that all intrusions not based on at least a reasonable suspicion were necessarily prompted by "whim, caprice, or idle curiosity" and were, therefore, unreasonable.[59] The court rejected both arguments.

In analyzing the "blanket prohibition" argument, the court first posited that not all police-citizen encounters constitute a seizure. This limitation on the scope of a fourth amendment seizure was based upon prior decisions of the New York Court of Appeals which had defined seizure of the person for constitutional purposes as a "*significant interruption* with an individual's liberty of movement."[60] The *DeBour* court felt that a seizure was primarily related to "aggressive government interference" and it limited the definition of a seizure to conduct which "bespoke" a "violent or forcible apprehension."[61] The court found that DeBour was not violently or forcibly seized but "was merely approached and questioned." This questioning, the court concluded, did not constitute a seizure and therefore "reasonable suspicion" was not required.[62]

Two effects of the above reasoning require close examination. First, in *Terry v. Ohio*[63] the United States Supreme Court defined a seizure as that which occurs when an officer "*accosts* an individual *and restrains* his freedom to walk away"[64] or "by means of physical force or *show of authority . . . in some way restrain*[*s*] the liberty of

57. *Id.* at 215, 386 N.Y.S.2d at 379, 352 N.E.2d at 566.

58. *Id.* at 216, 386 N.Y.S.2d at 380, 352 N.E.2d at 567.

59. *See id.* at 217, 386 N.Y.S.2d at 380-81, 352 N.E.2d at 567-68. There appears to be some inconsistency between the arguments made by DeBour and those attributed to him by the court. *See, e.g.*, note 72 *infra.*

60. People v. DeBour, 40 N.Y.2d 210, 216, 386 N.Y.S.2d 375, 380, 352 N.E.2d 562, 567 (1976) (emphasis added).

61. *Id.* at 217, 386 N.Y.S.2d at 380, 352 N.E.2d at 567. The court cited two decisions as exemplifying such a forcible apprehension. In People v. Cantor, 36 N.Y.2d 106, 365 N.Y.S.2d 509, 324 N.E.2d 872 (1975), the officers surrounded the suspect's vehicle with their vehicles and then approached the suspect with their guns drawn. In People v. Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67, 330 N.E.2d 39 (1975), the officers stopped the suspect in his moving automobile, asked to see his license, and then subsequently asked permission to view the inside of the car. The essential distinction in degrees of intrusion between *Ingle* and *DeBour* is unclear.

62. People v. DeBour, 40 N.Y.2d 210, 217, 386 N.Y.S.2d 375, 380, 352 N.E.2d 562, 567 (1976).

63. 392 U.S. 1 (1968).

64. *Id.* at 16 (emphasis added).

a citizen."[65] In *DeBour*, however, the court of appeals characterized a seizure as "a significant interruption" resulting from "aggressive government interference" of a "violent or forcible" nature. It is apparent that such a restrictive definition constricts the scope of a seizure as defined in *Terry* and thereby restricts the levels of intrusion to which the reasonable suspicion requirement inferable from *Terry* would be applied. The facts of *Terry* did exemplify a "forcible" seizure under either definition. The language of *Terry* with regard to seizures, however, suggests that its facts exemplified the maximum level of coercive intrusion within the meaning of a fourth amendment nonarrest seizure. By contracting the scope of intrusions that constitute seizures, the New York Court of Appeals may have invalidly confined the intended breadth of the *Terry* justification standards.

A second effect of limiting the scope of the *Terry* language with regard to the degree of intrusion that constitutes seizures is to increase the number of levels of intrusion that the court may in its discretion authorize without contravening established fourth amendment limitations. The New York Court of Appeals exercised its discretion and constructed a hierarchy of intrusions that are justifiable upon bases of suspicion less than a reasonable suspicion.[66] It is questionable, however, whether this hierarchy comports with fourth amendment requirements.[67]

The second basis upon which the court rejected DeBour's contentions was essentially one of policy. Although the questioning of

65. *Id.* at 19 n.16 (emphasis added).

66. This hierarchy is set out in the text accompanying note 55 *supra*.

67. Before *Terry v. Ohio* was decided, some writers had argued that the reasonable suspicion requirements of state "stop-and-frisk" statutes were constitutionally insufficient. *See, e.g.*, Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L. C. & P.S. 433 (1967). Further, although the Supreme Court has adopted a "reasonable suspicion" standard for car stops, United States v. Brignoni-Ponce, 422 U.S. 873 (1975), it has never adopted that standard for pedestrian detentions and in one case expressly refused to rule on the sufficiency under the fourth amendment of the same New York statutory standard of "reasonable suspicion" that was restricted in *DeBour*. Sibron v. New York, 392 U.S. 40, 61 n.20 (1968). Recently, Judge Goldberg of the Fifth Circuit Court of Appeals argued that "reasonable suspicion" is an insufficient standard to justify forcible seizures which entail the use of deadly force or obstruction of avenues of escape. United States v. Worthington, 544 F.2d 1275, 1282 (5th Cir. 1977) (Goldberg, J., dissenting). He concluded that "where [the] initial confrontation is accompanied by a degree of coercion and restraint . . . greater than that ordinarily or necessarily associated with a policeman's request to stop and answer questions," the officer's actions must be based upon probable cause. *Id.* at 1288. Although the force of Judge Goldberg's argument is mitigated somewhat by the fact that *Terry* had sustained a forcible seizure upon a basis of suspicion less than probable cause, his articulation of previously asserted doubts concerning the protective sufficiency of the reasonable suspicion standard, *see, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 888-90 (1975) (Douglas, J., concurring), and the Supreme Court's reluctance to apply that standard to street detentions, indicate that the status of this standard under the fourth amendment remains uncertain. It could reasonably be concluded that any standard of justification *less* demanding than "reasonable suspicion" lacks the "specificity, reliability, and objectivity which is the touchstone of permissible governmental action under the Fourth Amendment." Sibron v. New York, 392 U.S. 40, 61 n.20 (1968). Thus, the New York Court of Appeals not only appears to have substantially limited the scope of fourth amendment protection of pedestrians intended by *Terry* through its restrictive definition of "seizure", but also appears to have filled the doctrinal void left by *Terry* with justificational criteria of questionable constitutionality.

DeBour had been characterized as an intrusion not requiring "a reasonable suspicion", the court recognized that other constitutional principles had to be satisfied before the intrusion could be validated. Because the fourth amendment was intended to "safeguard the privacy and security of each and every person against all arbitrary intrusions by government" the court concluded that "the spirit of the Constitution" would be violated "any time an intrusion on the security and privacy of the individual [was] undertaken with intent to harass or [was] based upon mere whim, caprice or idle curiosity."[68] The court was not willing, however, to rule that all intrusions not based upon "a reasonable suspicion" were necessarily prompted by whim or caprice. This unwillingness stemmed from the court's belief that it would not be feasible to require the police to have a reasonable suspicion that a person was involved in criminal activities before they could initiate any type of encounter whatsoever. The court reasoned that such a restrictive requirement would "probably lead to an overcompensation in the form of a dilution of the standards embracing reasonable suspicion."[69] The court further reasoned that these requirements would unrealistically "hamper the police in the performance of their other vital tasks," including such "public service functions" as making "inquiry of passers-by to find the parents of a lost child."[70] Thus, the court rejected as being impracticable the "all or nothing" argument attributed to DeBour.

The court's reasoning in support of this policy-based rejection of DeBour's position is unsatisfactory. The possibility of courts diluting the reasonable suspicion standard if it were imposed upon *all* encounters does not satisfactorily explain why this criterion could not or should not be imposed upon the other levels of intrusion recognized in *LaPene*.[71] No reason is given why a reasonable suspicion could not be required for intrusions initiated to gain explanatory information or for inquiries prompted by indications of criminality. The premise for restricting the reasonable suspicion criteria to forcible seizures appears to be that only higher intensities of physical intrusion require the stricter criteria of justification. However, because an arrest and full search exists as the possible consequence of stopping the suspect and attempting to elicit explanatory-incriminatory information, it is superficial to permit an officer to commence the process of acquiring probable cause for an arrest on a lesser standard of justification merely because his initial contact with the suspect was not forcible. The court's unsupported assumption that requiring a reasonable suspicion

68. People v. DeBour, 40 N.Y.2d 210, 217, 386 N.Y.S.2d 375, 380-81, 352 N.E.2d 562, 567-68 (1976).

69. *Id.* at 217, 386 N.Y.S.2d at 381, 352 N.E.2d at 568.

70. *Id.* at 218, 386 N.Y.S.2d at 381-82, 352 N.E.2d at 568-69.

71. These levels are set out in the text accompanying note 55 *supra*.

in order to question suspects would unreasonably hamper effective criminal law enforcement should not be sufficient to outweigh the privacy values on which the fourth amendment is based. If this cannot be affirmatively shown, then the threat of potential arrest inherent in explanatory inquiries and the generally coercive nature of such interrogations warrant the requirement of a reasonable suspicion for all incriminatory questionings.[72]

B. *A New Level of Permissible Intrusion*

By determining that all intrusions not based upon reasonable suspicion were not necessarily invalid as whimsical or capricious, the *De Bour* court recognized the existence of degrees of intrusion, not amounting to seizures, that could be justified by less than a "reasonable suspicion." One of these levels of intrusion previously isolated by the court was the common law right of inquiry.[73] In *People v. La Pene*[74] the court defined this level as an interference "to the extent necessary to gain explanatory information, but short of a forcible seizure."[75] The court, however, did not consider this level of intrusion in reviewing the questioning of DeBour. Rather, in *DeBour* the court of appeals recognized a new level of permissible intrusion which was ruled to be less intrusive than the common law right of inquiry. This new level was characterized as the right of a policeman to "approach a private citizen on the street for the purpose of requesting information."[76] The court adopted the following justification for this newly authorized level of intrusion: "The basis for this inquiry need not rest on any indication of criminal activity on the part of the person of whom the inquiry is made but there must be some *articulable reason* sufficient to justify the police action which was undertaken."[77]

72. Even assuming *arguendo* that a reasonable suspicion should not be required for intrusions less than forcible seizures, the court failed to explain why it declined to work within the hierarchy of intrusions it had created and apply the founded suspicion standard required when the police "interfere with a citizen to the extent necessary to gain explanatory information." After making DeBour stand still, the officers immediately posed questions seeking his name, an explanation of his business in the neighborhood, and an explanation of what was beneath his jacket. These questions clearly appear to be seeking "explanatory information." Nevertheless, despite DeBour's contention that the founded suspicion standard should be applied, the court did not focus on the "explanatory" nature of this questioning, but instead inexplicably characterized DeBour's argument as seeking the application of the reasonable suspicion standard. As previously discussed, the court concluded that the nonforcible nature of the officers' conduct precluded the application of this latter standard.

73. *See* People v. Cantor, 36 N.Y.2d 106, 114, 365 N.Y.S.2d 509, 517, 324 N.E.2d 872, 878 (1975); People v. Rivera, 14 N.Y.2d 441, 446, 252 N.Y.S.2d 458, 462, 201 N.E.2d 32, 35 (1964), *cert. denied*, 379 U.S. 978 (1965).

74. 40 N.Y.2d 221, 386 N.Y.S.2d 384, 352 N.E.2d 571 (1976).

75. *Id.* at 223, 386 N.Y.S.2d at 384-85, 352 N.E.2d at 572.

76. People v. DeBour, 40 N.Y.2d 210, 213, 386 N.Y.S.2d 375, 378, 352 N.E.2d 562, 565 (1976).

77. *Id.* at 213, 386 N.Y.S.2d at 378, 352 N.E.2d at 565 (emphasis added). In People v. LaPene, 40 N.Y.2d 221, 223, 386 N.Y.S.2d 384, 384, 352 N.E.2d 571, 572 (1976), the court described this justification as "some objective credible reason . . . not necessarily indicative of criminality."

This new right to approach and request information was not intended to be unrestrictedly exercised in all circumstances. The court recognized that police rights of intrusion based upon a justification as minimal as "some articulable reason" might readily be abused and subsequently justified by fabricated reasons. Thus, the court recognized a distinction between two types of police functions, the public service function and the criminal law enforcement function.

In relation to the public service function, the court felt that "the police should be given wide latitude to approach individuals and request information."[78] This right would be limited only by a general requirement of reasonableness. The court, however, rather circularly described this public service function as involving those police activities not related to criminal law enforcement, and implied its nature by recognizing "the obligation of policemen to render assistance to those in distress."[79] The court might have further clarified this distinction by including in the criminal law enforcement function questions eliciting potentially incriminating information not directly relevant to any "public service." For example, questions seeking a person's identity, his purpose in the neighborhood, or the nature of his possessions would not appear relevant to a public service such as attempting to find the parents of a lost child. The court did not take this approach, however, and the considerations referred to above were the only means posited for distinguishing the two functions. It is apparent that the ambiguous distinction between the two functions may permit the justification of criminal law enforcement inquiries under the "wide latitude" standard ostensibly intended only for public service functions.

The court viewed the criminal law enforcement function in a less permissive fashion and determined that the activities of the police within this function were to be "measured by an entirely different standard of reasonableness."[80] The court felt this necessary because of "the tendency to submit to the badge and [the] belief that the right to be left alone is 'too precious to entrust to the discretion of those whose job is the detection of crime.' "[81] Thus, the court established three criteria for determining the reasonableness of inquiries made during the performance of this function: "[A] policeman's right to request information while discharging his law enforcement duties will hinge on [1] the manner and intensity of the interference, [2] the gravity of the crime involved and [3] the circumstances attending the encounter."[82] The purpose of these criteria was to distinguish reasonable

78. People v. DeBour, 40 N.Y.2d 210, 218, 386 N.Y.S.2d 375, 381-82, 352 N.E.2d 562, 568 (1976).

79. *Id.* at 218, 386 N.Y.S.2d at 382, 352 N.E.2d at 568-69.

80. *Id.* at 218-19, 386 N.Y.S.2d at 382, 352 N.E.2d at 569.

81. *Id.* at 219, 386 N.Y.S.2d at 382, 352 N.E.2d at 569.

82. *Id.*

requests for information from whimsical requests in order to reduce the possibility of improper invasions of privacy being sustained by lower courts.

The court applied these criteria to the questioning of DeBour and concluded that the police officers legitimately approached DeBour to inquire about his identity. The manner and intensity of the intrusion was considered sufficiently limited because the encounter was "devoid of harassment or intimidation," was of brief duration, and did not subject DeBour to a "loss of dignity."[83] Furthermore, the questions posed to DeBour had been "circumscribed in scope to the officers' task as foot patrolmen."[84] The court also indicated that because the crime the officers sought to prevent involved narcotics, it was sufficiently grave to justify approaching DeBour. Finally, the court concluded that because DeBour had "conspicuously crossed the street to avoid walking past the uniformed officers" while walking after midnight in an area known for a high incidence of drug activities, "the attendant circumstances were sufficient to arouse *the officers'* interest."[85] Thus, the court concluded that the officers' conduct "rather than being whimsical . . . was reasonable"[86] and therefore was authorized under the newly recognized right to request information. The court further ruled that in light of these factors and the fact that the officers noticed a bulge in DeBour's jacket after confronting him, their request of De Bour to identify the source of the waistband bulge was reasonable. Thus, because the initiation and the scope of the intrusion were determined to be reasonable, the incriminating weapon was the fruit of a valid intrusion and was admissible evidence of DeBour's crime.

The three criteria established in *DeBour* for determining the reasonableness of an officer's request for information do not appear consistent with traditional fourth amendment analysis and therefore merit close examination. Commonly, the determination of whether an intrusion was reasonably warranted by the circumstances surrounding it has been an objective procedure based exclusively on the facts known to the officer prior to the initiation of the intrusion.[87] The rationale for this procedure was well stated, albeit not applied by the court in *DeBour*: "The police may not justify a stop by subsequently acquired suspicion resulting from the stop. This reasoning is the same [as that] which refuses to validate a search by what it produces . . . ."[88] *DeBour*'s first criterion, "the manner and intensity of the intrusion,"

83. *Id.* at 220, 386 N.Y.S.2d at 383, 352 N.E.2d at 570.

84. *Id.*

85. *Id.* (emphasis added).

86. *Id.*

87. *See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

88. People v. DeBour, 40 N.Y.2d 210, 215-16, 386 N.Y.S.2d 375, 380, 352 N.E.2d 562, 566-67 (1976).

is analogous to such "subsequently acquired suspicion" for purposes of determining whether the initiation of the stop was reasonable because both are determined only after the intrusion has commenced, and neither bears on whether its initiation was reasonably warranted.[89]

The second criterion, "the gravity of the crime involved," also differs from the traditional elements of analysis. The gravity of the crime was generally considered irrelevant to the determination of whether the initiation of the intrusion was justified because the seriousness of the crime had no bearing on whether the officer had sufficient grounds to suspect a particular individual of the crime.[90] Rather, the analysis focused on whether the facts known to the officer reasonably gave rise to a suspicion that the individual confronted had committed or was committing *a* crime.[91] In *DeBour*, however, the court emphasized the seriousness of narcotics crimes in support of its determination that the questioning of DeBour was reasonable.

The third criterion, "the circumstances attending the encounter," also appears deficient *as applied* by the court. Traditionally, the decision of whether the intrusion was warranted turned upon whether the circumstances preceding the encounter would engender in a *reasonable man* a suspicion of criminal activity.[92] In *DeBour*, however, the court focused only on whether the attendant circumstances were sufficient to arouse the interest of *the officers involved.*

IV. THE EFFECTS OF *DeBour* AND THE GRADATION OF FOURTH AMENDMENT THEORY

In his Oliver Wendell Holmes Lectures concerning the fourth amendment, Professor Anthony Amsterdam examined the dangers of adopting "a general fourth amendment theory that increasing degrees of intrusiveness require increasing degrees of justification and increasingly stringent procedures for the establishment of that justification."[93] He concluded that this gradation process would severely

89. *But see* Schmerber v. California, 384 U.S. 757 (1966), in which the Supreme Court was called upon to determine what degree of fourth amendment justification was required to validate the forcible taking of a sample of a suspect's blood in order to analyze its alcohol content. Professor Amsterdam has described the *Schmerber* decision as indicating that "searches which breached the body wall . . . intruding more upon the 'interests in human dignity and privacy' than do external body searches, require greater justification." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 390 (1974). Professor Amsterdam further stated that "[t]here [was] also an intimation in the opinion that body-breaching searches, presumably whether made with or without a warrant, are allowable only upon 'a clear indication that . . . evidence will be found' . . .—a requirement that seems to be more rigorous than the traditional probable cause standard." *Id.* at 464 n.393.

90. *But see* People v. Morales, 22 N.Y.2d 55, 290 N.Y.S.2d 898, 238 N.E.2d 307 (1968).

91. *See, e.g.*, text accompanying notes 40 and 41 *supra.*

92. *See* note 41 *supra* and accompanying text. *But see* note 37 *supra.*

93. Amsterdam, *supra* note 89, at 390.

threaten privacy and security rights by ultimately placing their integrity solely in the discretion of the police.[94]

The hierarchy of permissible fourth amendment intrusions summarized in *People v. La Pene* makes it clear that the New York Court of Appeals has graduated fourth amendment theory into increasing degrees of intrusion and correlative justifications. The policemen's right to request information recognized in *De Bour* became the minimum permissible intrusion in this hierarchy.[95]

The gradation process creates several dangers to privacy-security rights that merit identification and examination. First, the gradation process has spawned a permissible initiation of the investigatory process that will bring about arrests upon the basis of officers' subjective suspicions. Second, this process has established a successful means of circumventing the fourth amendment exclusionary rule. Finally, the gradation of pre-existing fourth amendment doctrine has increased the likelihood of unreasonable intrusions. The police may be prompted by lower requirements of suspicion to act more freely upon their instincts and the lower requirements may limit the ability of the courts to regulate police conduct.

A. *Objective Standard Eliminated*

The legitimacy of police conduct that evokes fourth amendment protections by affecting privacy and personal security rights has traditionally been measured by an objective standard. The Supreme Court has referred to "specificity, reliability, and objectivity" as "the touchstone of permissible governmental action under the Fourth Amendment."[96] The need for objective justifications has been imposed both upon arrests[97] and upon nonarrest, forcible seizures of the person.[98] The Supreme Court indicated the focus of these standards in *Terry v. Ohio*: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[99] The Court has also expressly stated that the subjective "good faith" of an officer is not a satisfactory justification for making an intrusion: "[G]ood faith on the part of the arresting officers is not enough. . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'se-

94. *Id.* at 394.
95. For the entire hierarchy, see the text accompanying note 55 *supra*.
96. Sibron v. New York, 392 U.S. 40, 61 n.20 (1968).
97. *See, e.g.*, Draper v. United States, 358 U.S. 307 (1959).
98. *See* Terry v. Ohio, 392 U.S. 1 (1968).
99. *Id.* at 21-22.

cure in their persons, houses, papers, and effects,' only in the discretion of the police."[100]

The objective standard was imposed upon fourth amendment seizures in an effort to place some meaningful check upon the street activities of the police. It was hoped that this standard would substantially decrease unreasonable violations of personal liberties that might arise from unregulated police conduct prompted by discretionary, subjective motivations. The Supreme Court realized that the police would not impose this meaningful check upon themselves so that it would have to be enforced by the judiciary.[101] And because judicial determinations of the reasonableness of police intrusions could be prejudicially influenced by the presence of any incriminating evidence uncovered, the Court has required that the determination of reasonableness be based solely on the circumstances preceding the intrusion,[102] irrespective of what it produced. Thus, objective justificational standards were imposed to protect privacy rights from disregard by the police *and* the judiciary. The judiciary therefore has a duty to preserve these rights by liberally construing and conscientiously enforcing fourth amendment doctrines.

Street questionings, including "requests" eliciting potentially incriminating information, evoke fourth amendment protection because they invade an individual's privacy.[103] Although some courts have equated police questionings with the exercise of the ordinary citizen's right to ask questions of others,[104] police inquiries within the scope of the criminal law enforcement function should not be considered in such a simplistic manner because of the possibility of further intrusion and the citizen's lack of choice in deciding whether to respond.[105] Therefore, police conduct in questioning pedestrians should be subjected to fourth amendment restrictions, including an objective standard of jus-

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100. Beck v. Ohio, 379 U.S. 89, 97 (1964).

101. This is also a reason for imposing the warrant procedure upon some forms of search and seizure. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

102. *See, e.g.*, Beck v. Ohio, 379 U.S. 89, 96 (1964).

103. *See* text accompanying notes 22-24 *supra*.

104. For example, in *DeBour*, the New York Court of Appeals concluded that "the obvious fact that any person in our society may approach any other person and attempt to strike up a conversation, make[s] it clear that the police have the authority to approach civilians." People v. DeBour, 40 N.Y.2d 210, 219, 386 N.Y.S.2d 375, 382, 352 N.E.2d 562, 569 (1976).

105. Professor Reich isolated this issue as follows:

> Of course any individual has a right to approach any other individual. . . . But it is not quite the same when the police stop someone. There is authority in the approach of the police, and command in their tone. I can ignore the ordinary person, but can I ignore the police?

Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1162 (1966).

In 34 Mo. L. REV. 425, 432 (1969), the student author considers a four-step progression of investigatory intrusions and justifications that, although commencing with a less intrusive street questioning, permits an officer to "work his way up to a valid full search of the detained individual."

tification, in order to safeguard the privacy rights involved. Before questions eliciting potentially incriminating responses can be deemed "appropriate," the facts available to the officer before the questioning should lead a "reasonable man" to the conclusion that criminal activity is afoot. Only in this way can all citizens be protected from unwarranted invasions of privacy.

The *DeBour* decision is inconsistent with such an interpretation of the reasonable man standard. The traditional analysis of reasonableness focuses on whether the facts known prior to the initiation of the intrusion warrant a *reasonable man's* conclusion that the suspect was involved in crime, rather than on whether those facts led the *officer involved* to suspect criminality.[106] In this way, the traditional analysis attempts to distinguish between objective and subjective justifications, approving only intrusions based on the former.

The *DeBour* criteria abandon this distinction because they require only that the pre-intrusion facts arouse the interest of the officer making the inquiries—a subjective determination of whether the facts warranted the intrusion. The court of appeals appears to be assessing the "reasonableness" of an intrusion by determining whether an officer's motivations were whimsical or nonwhimsical; allowing as reasonable any intrusion based on the latter, even if the facts would not arouse suspicion in a "reasonable man." The three criteria employed by the court appear to be directed toward making this determination. If the application of these criteria to the facts of a questioning demonstrate that the officer's reasons for stopping the suspect were not whimsical or capricious, then the initiation of the intrusion will be deemed appropriate, even if the motivations would be categorized as subjective under a traditional analysis.

This departure from traditional doctrine was recognized by Judge Fuchsberg in his dissent in *DeBour*. He concluded that the facts preceding the questioning of DeBour could not support a reasonable man's conclusion that a criminal law enforcement questioning was warranted and that the majority had thus essentially authorized a policeman to act on the basis of his subjective suspicions.

> If merely crossing a street can justify police detention of a citizen for questioning, it is difficult to imagine what type of activity exists which would not authorize the initiation of such a confrontation. In a very real sense, the objective standard of "articulable suspicion" will have been gutted and replaced by little more than the existence of a subjective hunch.[107]

Permitting an officer to conduct incriminating questionings solely

106. *See* the Supreme Court's definition of probable cause in Draper v. United States, 358 U.S. 307, 313 (1959), and the objective standard enunciated in *Terry*, 392 U.S. at 21-22. *But see* the language of the holding in *Terry* that appears to be contrary to this traditional standard, at notes 36-37 *supra* and accompanying text.

107. People v. DeBour, 40 N.Y.2d 210, 230, 386 N.Y.S.2d 375, 389, 352 N.E.2d 562, 577 (1976) (Fuchsberg, J., dissenting).

upon the basis of his subjective suspicions endangers privacy and security rights. It is well documented that a policeman's sensitivity to the possible criminality of street circumstances far exceeds the sensitivity of a neutral observer.[108] The subjective "interest" of an officer "trained to be wary and conditioned to be suspicious"[109] could be stimulated by events or circumstances that the "reasonable man" would consider innocuous.[110] In essence, the *DeBour* decision has determined that nonwhimsical subjective police decisions to request information are conclusively reasonable despite the traditional fourth amendment practice of having the "reasonable man" determine whether an intrusion was reasonable.

B. *The Circumvention of the Exclusionary Rule Through Gradation*

The gradation of fourth amendment theory also provides a convenient model for circumventing the exclusionary rule. The danger rests primarily on the common recurrence of circumstances that might trigger further gradation.[111]

For instance, several jurisdictions have authorized their police to "stop" and question individuals upon the basis of a reasonable suspicion of criminality.[112] Eventually, however, a situation may arise in one of these jurisdictions in which an officer detains an individual on the basis of circumstances that do not support a reasonable suspicion. The intrusion may uncover incriminating evidence which clearly demonstrates that the suspect was in fact involved in crime. Ultimately, a court will be called upon to decide whether the exclusionary rule should be enforced against *this* "illegally obtained" evidence, which is probably necessary to the successful prosecution of *this* "obviously" guilty criminal.

The court may be persuaded to determine that in *this* case the existing fourth amendment justification doctrine that has traditionally been imposed upon this level of police intrusion, but which would

108. *See, e.g.*, J. SKOLNICK, JUSTICE WITHOUT TRIAL (2d ed. 1975). The author states that the "policeman's role contains two principal variables, danger and authority. . . . The element of danger seems to make the policeman especially attentive to signs indicating a potential for violence and lawbreaking. As a result, the policeman is generally a 'suspicious person.' " The author concludes that "the police, as a result of combined features of their social situation, tend to develop ways of looking at the world distinctive to themselves . . . ." *Id.* at 42-44.

109. People v. DeBour, 40 N.Y.2d 210, 230, 386 N.Y.S.2d 375, 389, 352 N.E.2d 562, 577 (1976) (Fuchsberg, J., dissenting).

110. Some police assert that it is not possible to express, in a meaningful way, the basis for the conclusion that the circumstances are sufficiently suspicious to justify a field interrogation. . . . With experience some officers also acquire a perception which the ordinary person lacks, and thus may see suspicion-arousing circumstances which other persons would miss.

L. TIFFANY, D. MCINTYRE, D. ROTENBERG, DETECTION OF CRIME 40 (1967) [hereinafter cited as TIFFANY].

111. Consider, for example, the use of the "articulable reason" standard in Lawson v. Commonwealth, 228 S.E.2d 685, 687 (Va. 1976).

112. *See* notes 29 and 32 *supra*.

now require the exclusion of necessary incriminating evidence, should not be applied. Two means of achieving this result are available. First, the court could reject the old justification doctrine on policy grounds in favor of a lesser standard which will thereafter apply to *this* level of intrusion and which was satisfied in *this* case.[113] Second, the court could restrictively interpret the language of the old doctrine so that it does not apply to the circumstances of *this* case.[114] This maneuver permits the court to fill the resulting doctrinal void with less restrictive standards. Thus, probable cause may give way to "reasonable suspicion," which may give way to "founded suspicion"; and a seizure may require a "violent or forcible apprehension," which no longer includes mere common law inquiries or requests for information.[115]

Initially, this process of avoiding the exclusionary rule may seem reasonable because, although distinctions have been made in the degrees of intrusion and in justifications necessary for these intrusions, the traditional requirement of objectivity has been preserved and still provides some measure of protection for privacy-security rights. After several troublesome cases have caused doctrinal dissections, however, the court may have imperceptibly retreated into adopting as a "reasonable" basis for making an intrusion one officer's subjective suspicion that *this* criminal was acting in a sufficiently unusual manner to warrant investigation.[116] By so doing, the court will again have succeeded in disallowing *this* criminal to invoke the exclusionary rule; however, the court's gradation of fourth amendment theory will have culminated in subjecting even the most marginally unusual conduct to potential examination and will have extinguished the usefulness of the exclusionary rule except in cases of the most whimsical or flagrantly unreasonable police conduct.

Two views of the exclusionary rule that may be contributing to this process of circumventing its restrictions merit critical examination. First, the exclusionary rule has been perceived as simply a doctrinal technicality that frustrates justice.[117] This view is myopic at best; for it must be remembered that besides pertaining to the imposition of sanctions upon proven criminals, justice also concerns the reasonable enjoyment of human rights and the development of rules that instill and

113. Arguably, this is the technique utilized by the Supreme Court in *Terry* in refusing to apply both the warrant and the probable cause standards to the nonarrest "rubric of conduct." *See* Terry v. Ohio, 392 U.S. 1, 20, 22 (1968).

114. *See* People v. DeBour, 40 N.Y.2d 210, 217, 386 N.Y.S.2d 375, 380, 352 N.E.2d 562, 567 (1976).

115. *See* People v. LaPene, 40 N.Y.2d 221, 222-23, 386 N.Y.S.2d 384, 384-85, 352 N.E.2d 571, 571-72 (1976).

116. *See* 40 N.Y.2d at 213-14, 386 N.Y.S.2d at 378, 352 N.E.2d at 565.

117. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

enforce the government's respect for these rights. In this sense, the exclusionary rule serves two functions. First, it forces the police to reconsider unreasonably intrusive practices that may have been exercised against all individuals in an effort to uncover evidence from actual criminals.[118] The exclusionary rule was adopted in the hope that a *strict* enforcement of its sanctions would motivate officers to give some degree of marginally suspicious conduct the benefit of further observation. This additional observation might often show the conduct observed to be innocuous and thereby avoid intrusions based on an officer's instinctual, but inaccurate, reactions.

The second function of the exclusionary rule is to act as a severe caveat to the courts that, even in the pursuit of important law enforcement goals fourth amendment rights are not to be disregarded.[119] In establishing the exclusionary rule in *Weeks v. United States*, the Supreme Court voiced this underlying rationale:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[120]

As long as the vitality of the fourth amendment doctrines that trigger the rule exists, the invocation of its sanctions by defendants unreasonably seized will activate the duty of the judiciary to preserve individual rights against unreasonable governmental invasion.

Another disparaging view of the exclusionary rule is that it serves only to protect guilty criminals. Gradations of fourth amendment theory that evade application of the exclusionary rule appear motivated largely by the fact that its application serves to suppress obviously reliable evidence incriminating a presumably guilty defendant. The exclusionary rule is not intended to protect criminals, however, nor was it created to give criminals a "sporting chance." Rather, the rule was adopted to preserve the innocent privacy of individuals who might otherwise be routinely seized on the basis of the instinctual urges of officers caught up in the "often competitive enterprise of ferreting out crime."[121] Justice Traynor has identified this purpose as follows:

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118. In describing the importance of the exclusionary rule in *Terry*, the Supreme Court stated that "experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.'" Terry v. Ohio, 392 U.S. 1, 12 (1968). *See* People v. Brown, 45 Cal. 2d 640, 644, 290 P.2d 528, 530-31 (1955).

119. In *Terry*, the Court said: "The [exclusionary] rule also serves another vital function—'the imperative of judicial integrity.' . . . Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." 392 U.S. at 12-13.

120. 232 U.S. 383, 393 (1914).

121. Johnson v. United States, 333 U.S. 10, 14 (1948).

> [W]hen consideration is directed to the question of the admissibility of evidence obtained in violation of the constitutional provisions, it bears emphasis that the court is not concerned solely with the rights of the defendant before it, however guilty he may appear, but with the constitutional right of all of the people to be secure in their homes, persons, and effects.[122]

In this sense, the importance of the exclusionary rule is directly tied to the fundamental nature of the rights it protects. Rather than yielding to the temptation to preserve the evidence at all costs, the court's primary motivation should be to preserve the innocent privacy that is left vulnerable by any dilution of justifications necessary for the police to initiate intrusive action and, consequently, by any avoidance of the exclusionary rule that is effected.

C. *Adverse Effects of Gradation on Police Attitudes and Control of Police Activity by the Judiciary*

The gradation of fourth amendment theory may have the further effect of increasing the likelihood of unwarranted invasions into the privacy and security of innocent persons. Policemen may become more willing to immediately act upon their instinctual suspicions if lower justificational requirements facilitate the defense of their actions as reasonable and thereby increase the likelihood that any uncovered evidence will be preserved.

In *DeBour*, the court of appeals authorized a criminal law enforcement "inquiry" on the basis of "some articulable reason"—a subjective standard of justification. It is evident, however, that inquiries made while carrying out the criminal law enforcement function seek explanatory information. For example, law enforcement inquiries concerning name, nature of business in the neighborhood, and nature of possessions all seek *explanations* from the suspect. Thus, *DeBour* sanctioned, in effect, the initiation of intrusions to gain "explanatory information" on the basis of an officer's subjective suspicions.

The summary in *People v. LaPene* of the hierarchy of permissible intrusions demonstrates that an interference to gain explanatory information previously required the more stringent objective justification of a "founded suspicion."[123] A look beyond the semantic distinctions between this "explanatory" level of intrusion and the law enforcement "inquiries" in *DeBour* reveals that the pre-existing objective *limitation* upon the officer's conduct has been replaced by a subjective *license* to act under the presumption that the officer's conduct will be reasonable unless shown to be motivated by whim or caprice. Thus, the attitude toward the initiation of intrusions encouraged by *DeBour*, viewed

122. People v. Brown, 45 Cal. 2d 640, 644, 290 P.2d 528, 530 (1955). *See* Draper v. United States, 358 U.S. 307, 314-15 (1959) (Douglas, J., dissenting).

123. *See* text accompanying note 55 *supra*.

in light of the fact that policemen are "trained" to be suspicious,[124] portends an increase in the frequency of invasions of innocent privacy.

An effect of this change in attitude may be a corresponding increase in those coercive police practices which have been criticized as vitiating the dignity of the persons detained,[125] enforcing the race, age, or status prejudices of each policeman,[126] and generating bad police-community relations.[127] Similar increases may also occur in the use of discretionary arrest laws[128] or excessive force in carrying out intrusions.[129] The increase in intrusions likely to result from the lessening of justificational standards will undoubtedly increase the opportunities for the exercise of these undesirable practices, which have persisted despite the pre-existing, stringent standards.

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124. *See* notes 108-10 *supra* and accompanying text.

125. "A common belief among those interviewed is that the police are inhuman and are insensitive to the Negroes' need to be respected and treated with dignity. This produces frustration and a rebellious spirit." J. LOHMAN AND G. MISNER, 1 THE POLICE AND THE COMMUNITY 54 (1966) (San Diego) [hereinafter cited as SAN DIEGO STUDY]. *Accord*, J. LOHMAN AND G. MISNER, 2 THE POLICE AND THE COMMUNITY 85 (1966) (Philadelphia) [hereinafter cited as PHILADELPHIA STUDY]; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ON THE POLICE 184-85 (1967) [hereinafter cited as POLICE TASK FORCE REPORT]. *See generally*, Reich, *supra* note 105, at 1164.

126. "[F]ield interrogations are sometimes used in a way which discriminates against minority groups, the poor, and the juvenile." POLICE TASK FORCE REPORT, *supra* note 125, at 184. *Accord*, SAN DIEGO STUDY, *supra* note 125 at 48, 82, 85-86. *See generally*, Reich, *supra* note 105, at 1164-65. Consider the possible intrusive effects that might arise from the following type of racial prejudice:

> For the police, the Negro epitomizes the slum dweller and he is considered inherently criminal both culturally and biologically. Individual policemen sometimes deviate sharply from this general definition, but no white policeman with whom the author has had contact failed to mock the Negro, to use some type of stereotyped categorization . . . .

W. WESTLEY, VIOLENCE AND THE POLICE 168 (1970).

127. "[S]ome valuable law enforcement techniques, like field interrogation, are frequently abused to the detriment of community relations." POLICE TASK FORCE REPORT, *supra* note 125, at 178. *Accord*, PHILADELPHIA STUDY, *supra* note 125, at 85; SAN DIEGO STUDY, *supra* note 125, at 82, 85, 128.

128. In 1966, Professor Reich stated:

> The police officer who stopped me in Long Lake, New York told me that he could arrest me on any of three or four charges if he chose to. He mentioned vagrancy and walking on the wrong side of the road; he might also have mentioned disorderly conduct, refusal to obey an order, loitering and perhaps the catchall notion of "suspicion" used in some jurisdictions.

Reich, *supra* note 105 at 1165. *See also* TIFFANY, *supra* note 110, at 62. Although Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), and Palmer v. City of Euclid, 402 U.S. 544 (1971), have declared specific vagrancy and suspicious persons ordinances unconstitutionally vague, these decisions do not mitigate the threat posed by the other laws mentioned and not mentioned by Professor Reich. Further, note that the mere threat of invoking the arrest power, regardless of its actual constitutionality, is generally sufficient to coerce cooperation from most suspects.

> Officers indicate that few persons will continue to refuse to identify themselves or answer questions when they learn that the police are willing to carry out their threat to make an arrest.
>
> . . . .
>
> Many persons who respond to police inquiries may feel they are compelled to do so. The tacit threat of arrest may exist even if the police do not have that power. It seems likely that this tacit threat is responsible for the apparently "voluntary" cooperation encountered in many cases.

TIFFANY, *supra* note 110, at 60, 64 (footnotes omitted). *Accord* Reich, *supra* note 105, at 1165.

129. *See* POLICE TASK FORCE REPORT, *supra* note 125, at 180-82.

The danger to privacy-security rights is further magnified by the fact that the dilution of justificational criteria formerly imposed may decrease the control the judiciary has over police conduct. Traditional fourth amendment analysis distinguished between objective and subjective justification criteria, favoring the objective "reasonable man" standard that permitted the court to determine the reasonableness of an intrusion upon an analytical basis extrinsic to the officer's subjective decision-making process. This form of analysis permitted the court to impose external influences upon police decision-making.

The effect of *DeBour*, however, is to eliminate the "reasonable man" standard for nonforcible, though incriminating seizures. The standards established in *DeBour* virtually force the lower courts to give conclusive weight to the subjective, but nonwhimsical, decisions of the police in determining whether their actions were reasonable.[130] Professor Amsterdam predicted that the effect of gradating fourth amendment doctrine would be to

> shortly slide back to the prescription . . . that "[t]he recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. Under that view, "[r]easonableness is in the first instance for the [trial court] . . . to determine." What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police. . . . The ultimate conclusion is that "the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police."[131]

Thus, the effects of replacing and lowering traditional standards of justification may be both to prompt the police to react more quickly to marginally unusual conduct and to discourage the judiciary from enforcing the more stringent standards.[132] The result is to increase the frequency or at least the risk of unwarranted invasions of innocent privacy.

V. CONCLUSION

Our society cherishes the right to privacy and at the same time demands swift and stringent enforcement of criminal laws. The task of law enforcement has been assigned to persons whose conduct is influenced by varying perceptions of the role of the police, varying personal thresholds of suspicion, and varying valuations of the importance

130. *But see* People v. Julian, 54 App. Div. 2d 76, 387 N.Y.S.2d 435 (1976) *and* People v. Branch, 54 App. Div. 2d 90, 387 N.Y.S.2d 581 (1976). In both cases the New York Supreme Court for the First Department avoided this effect of People v. DeBour by strictly limiting *DeBour* to its particular facts.

131. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974) (footnotes omitted).

132. People v. Julian, 54 App. Div. 2d 76, 387 N.Y.S.2d 435 (1976) and People v. Branch, 54 App. Div. 2d 90, 387 N.Y.S.2d 581 (1976) demonstrate that conscientious judges can limit the effects of the gradation process by limiting those decisions that implement the gradation process.

of privacy-security rights. Mr. Justice Jackson succinctly described the vulnerability of privacy-security rights in this society as follows:

> The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.
>
> [W]e must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible . . . .[133]

Presumably the Supreme Court incorporated objective standards of justifications into the reasonableness requirement of the fourth amendment because, as Justice Traynor concluded: "It would be manifestly impossible to protect the rights of the innocent if the police were permitted to justify unreasonable searches and seizures on the ground that they assumed their victims were criminals."[134] In addition to giving judges a conceptual basis for determining whether a policeman's intrusive actions were reasonable, the objective standards of justification also established a criterion of suspicion that was intended to regulate the conduct of those officers primarily concerned with the effective prosecution and incarceration of criminals. This latter intention was effectuated by the adoption of the exclusionary rule to enforce this regulation.

The effect of the gradation of fourth amendment theory, as epitomized by the hierarchy of intrusions summarized in *People v. La Pene* and also by the standard established in *People v. De Bour*, has been to authorize the circumvention of objective standards of justification and the exclusionary rule by permitting some degrees of intrusion to be based upon the subjective suspicions of policemen. Although this gradation does not eliminate the more stringent objective requirements, it is evident that an officer's accumulation of evidence that satisfies an objective standard will be greatly facilitated by doctrines that liberally authorize his being in a position to closely observe and, perhaps, stimulate "unusual" behavior.[135] An officer's presence or conduct may adversely influence a suspect's behavior; and this reaction to the officer, rather than any criminal intentions, may cause the suspect to behave in a manner that increases an officer's suspicion. This influence deserves consideration in the determination of the desirability of doctrines that allow the process of acquiring "probable cause to arrest" to begin upon the tenuous basis of an officer's subjective suspicion. That innocent persons may be arrested as a result of unsatisfactory reactions to police intrusions and that a significant degree of

133. Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

134. People v. Brown, 45 Cal. 2d 640, 644, 290 P.2d 528, 530 (1955), quoting from People v. Cahan, 44 Cal. 2d 434, 439, 282 P.2d 905, 907 (1955).

135. For example, an individual's rightful refusal to answer an officer's questions after the officer has confronted him may give rise to additional suspicion. "[T]he most common police attitude is that refusal to cooperate with an interrogating officer is indicative of guilt." TIFFANY, *supra* note 110, at 60.

protection for innocent privacy may be lost by permitting the initiation of intrusive actions to be based upon subjective suspicions should weigh heavily in judging the propriety of gradating fourth amendment theory.

This Case Comment has attempted to show that this gradation process, as exemplified by *People v. DeBour*, is not an enlightened accession to society's need for effective law enforcement. Rather, this divergence from traditional fourth amendment principles and doctrines unreasonably endangers privacy-security rights historically valued as essential to the very existence of a free society. In light of these dangers, it is time for the judiciary to reverse this process and to return to the protection of fourth amendment rights through the use of objective standards. Guidance from the Supreme Court in the area of street detention practices is obviously necessary if further unreasonable deviations from traditional principles are to be avoided. Until this guidance is given, however, the standard adopted by the Supreme Court to date—the "reasonable suspicion" standard which has been inferred from *Terry v. Ohio*[136] and expressly embraced in *United States v. Brignoni-Ponce*[137]—should be stringently enforced, and further gradation of fourth amendment theory that might give rise to additional unreasonable violations of privacy-security rights should be avoided.

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136. *See* text accompanying notes 37-39 *supra*.

137. 422 U.S. 873, 881 (1975).